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In the Supreme Court of the United States

OCTOBER TERM, 1982

EDMOND G. MIRANNE and
EDMOND G. MIRANNE, JR.,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government failed in its duty to preserve and advise petitioners of the existence of certain exculpatory material in violation of *Brady v. Maryland.*

2. Whether a conviction supported largely be perjured testimony, which perjury is known to the Government, should be allowed to stand.

3. Should a perjury conviction be permitted to stand when it appears probable that in convicting the jury relied upon the testimony of a witness who had perjured himself and this perjury was known to the Government.

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Petition for Writ of Certiorari to the
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The petition of Edmond G. Miranne and Edmond G. Miranne, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 27, 1982.

OPINION BELOW

The opinion of the Court of Appeals in *U.S. v. Miranne*, __F.2d__ (5th Cir. 1982), appears in the appendix hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1982. A timely petition for panel rehearing as well as a suggestion for rehearing en banc were denied on November 1, 1982. Petitioners sought and were granted a stay of the mandate pending disposition of their application for certiorari. This Court's jurisdiction is therefore invoked under 28 USC 1254 (1). The application is being filed within sixty (60) days of the denial by the Court of Appeals of the petition for panel rehearing and suggestion for rehearing en banc and is, therefore, timely under Rule 20 of this Court.

CONSTITUTIONAL PROVISIONS INVOKED

This case involves the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF THE CASE

The Indictment

Appellants, Edmond G. Miranne and Edmond G. Miranne, Jr., were indicted on January 29, 1981. Also named as a defendant in the 103-count indictment was Burl R. Mahl, III.

Count 1 charged a conspiracy to commit violations of

18 U.S.C. 657 and 1014. Counts 2 through 51 charged defendants with the substantive offense of making or causing to be made false statements, in violation of 18 U.S.C. 1014 and 2. Counts 52 through 101 charged defendants with the substantive offense of misapplication of funds, in violation of 18 U.S.C. 657 and 2. Counts 102 and 103 charge only defendant, Edmond G. Miranne, with the substantive violation of perjury, in violation of 18 U.S.C. 1621.

Prior to the trial of appellants, defendant Burl R. Mahl, III, tendered a plea of guilty to Count 1, the conspiracy count.

The trial of appellants began on April 13, 1981, and concluded on April 24, 1981. The jury found the defendant, Edmond Miranne, guilty on Counts 1, 26 through 51, 76 through 103. The jury found Edmond G. Miranne, Jr. guilty of Counts 1 through 101.

On May 1, 1981, appellants timely filed a motion for judgment of acquittal notwithstanding the jury's verdict, or alternatively, for a new trial. The motion was heard on May 27, 1981, and taken under submission. On August 3, 1981, by minute entry, the District Court denied appellants' motion. On August 12, 1981, appellants were sentenced. (See Appendix A).

Sometime prior to the sentencing of appellants, co-defendant Mahl was sentenced on his plea of guilty to

Count 1 and received a sentence of two years imprisonment. At that time, the remaining counts against co-defendant Mahl were dismissed in accordance with the plea agreement entered into by the United States of America and Mahl.

STATEMENT OF THE FACTS

In this multi-count indictment, the Government alleged that a conspiracy existed between Edmond G. Miranne, the president of Security Homestead Association, and Edmond G. Miranne, Jr., his son, the attorney and notary for Security Homestead Association, and Mahl, a real estate developer. The Government alleged and attempted to prove at trial that the defendants conspired to defraud the Security Homestead Association by entering into an agreement to misapply the funds of the Association to the benefit of Mahl in his purchase of certain real estate in New Orleans.

The indictment is constructed around 50 loan transactions which were made by the Security Homestead Association to Mahl. The 50 loan transactions occurred on three separate occasions and involved groups of 24, 18, and 8 loans. (Government Exhibits 2-51.) The first loan transaction occurred in January, 1976 (Government Exhibits 2-25), the second loan transaction occurred in February, 1976 (Government Exhibits 26-43), and the third transaction occurred in May, 1976 (Government Exhibits 44-51). The loans on the property involved were made through the

Family Finance Center of the Security Homestead Association. The first 42 loans were made in the amount of $10,000 each and the last 8 loans were made in the amount of $5,000 each.

The Government alleged that the loans were not made for the purpose of improving the property, but were made solely for the purpose of purchasing the property. The Government contended that Mahl used the proceeds of the loans he received to purchase the property. The acts of sale for the various property involved were passed by either defendant Miranne, Sr. or Miranne, Jr.

The record will show that Mahl purchased these properties almost simultaneously with the loan proceeds being distributed to him; however, the record will also show that the Government failed to prove: (1) that the properties were not renovated; and, (2) that Mahl did not have sufficient funds available to him at the time of the loan transactions to actually purchase the property. Not one witness testified that the properties were not, in fact, renovated. The Government did not call tenants of the property, and no testimony was offered from subsequent purchasers as to the condition of the properties. Mahl testified that the property was improved after it was purchased.

The evidence further indicated that Mahl had sufficient financial capacity at the time the loans were made to have purchased the property apart from, and exclusive of, the loans made through Security Homestead Association.

Edmond G. Miranne, Sr. was charged with two counts of perjury based upon two statements made by him to examiners of the Federal Home Loan Bank Board (FHLBB) while he was under oath in connection with an examination by that board. These statements in essence were that he had had no business dealing or financial transaction or dealing with Burl Mahl. The Government contended that he was partners with Mahl in the real estate transactions upon which the other counts in the indictment were based and that a transaction proposed by Mahl in connection with Metairie Towers, a complex owned by Miranne, Sr. and other partners, which transaction never got off the ground amounted to a business dealing or a financial transaction or dealing with Mahl.

SUMMARY OF THE ARGUMENT

The Government failed in its duty to preserve and advise petitioners of the existence of certain exculpatory material in violation of Brady v. Maryland. During the course of trial, the chief Government witnesses were impeached by the Government. Mahl, the co-defendant who had pled to Count 1 and agreed to testify against appellants, was impeached by the Government. Charles Lacoste, an accountant, and Nina Bankston, a former secretary in appellants' law offices at the time of the transactions charged in the indictment, were both impeached by the Government. The only remaining substantial witness, Joseph Toranto, was relied upon by the Government. Toranto was the manager of the Family Finance

Center of Security Homestead Association and had handled the loans to Mahl involved herein.

After the first week of trial, but before the Government had rested and after Mahl had testified for the Government, Mahl found a tape recording of a conversation with Toranto, which, if produced, would have shown conclusively that Toranto had perjured himself. The United States Attorney refused to listen to the tape when offered by Mahl's attorney and by failure to timely seize the tape allowed it to be destroyed by Mahl. The appellants are forever denied the right to present this critical demonstrative evidence to any jury, and the prejudice is so substantial that the indictment should be dismissed. This tape is crucial in light of the circumstances in this case and because of the profound effect such evidence would have upon the sole remaining unimpeached witness.

Whether a conviction supported largely by perjured testimony, which is known by the Government, should be allowed to stand. As stated above, Toranto was the only important Government witness not impeached by the Government. Furthermore, the Government attempted to bolster his testimony by vouching for his credibility.

In the instant case, the United States Attorney was offered an opportunity to hear the tape which would prove that Toranto was lying, he refused, stating that he believed the contents to be as related to him by Mahl's attorney. The Government is thereby charged with the knowledge of

the contents of the tape. The contents of the tape (See Appendix D) as stated in the stipulation of counsel would clearly prove Toranto to be lying. Yet the Government argued that Toranto was a truthful witness.

Since the Government presented perjured testimony and vouched for the credibility of the lying witness, the appellants' convictions should be reversed. The district judge should have granted appellants' motion for judgment notwithstanding the jury's verdict.

Was the evidence involving the perjury counts tainted? The Government simply failed to prove that Miranne, Sr., was a partner with Mahl or that he was involved in financial/business transactions with Mahl. The documentary evidence on partnership shows conclusively that Miranne, Sr., was not a partner with Mahl. Mahl alone testified that Miranne, Sr., was his partner, and Mahl was impeached by the Government over and over again. Mahl was impeached by both the Government and defendants, is not worthy of belief, and cannot be relied upon by the Government to prove a partnership with Miranne, Sr.

Mahl's telephone call to Miranne, Sr. (Government Exhibit 107(b)) did not constitute a business dealing or a financial transaction with Mahl. The verdict of the jury on the perjury counts should be reversed because of the taint of the perjured testimony of Toranto, in addition to the reasons cited above.

ARGUMENT

I. THE GOVERNMENT FAILED IN ITS DUTY TO PRESERVE AND ADVISE PETITIONERS OF THE EXISTENCE OF CERTAIN EXCULPATORY MATERIAL IN VIOLATION OF BRADY V. MARYLAND.

The unusual circumstances surrounding this issue and the following issue require a detailed statement of the bizarre happenings and the resulting intrigue surrounding these events and is contained in the statement of unique facts, Appendix E.

Considering the crucial nature of the tape and the fact that it clearly could be used by the defense to prove that one of the Government's important witnesses had, in fact, committed perjury, the Government's duty to preserve that evidence is clear. Yet, the Government did not issue a subpoena for its production and did not even request of Mulvehill (Mahl's attorney) that Mahl be requested to produce the tape to the Court the following morning.

The United States Attorney, after being advised of the contents of the tape, and refusing to listen to the tape is charged with the knowledge of the contents of the tape and cannot be heard to dispute those contents. Furthermore, to dispute the authenticity of the tape is begging the question. The tape is unavailable to the appellants due to

the failure of the United States Attorney to make the simple request that he be allowed to listen to the tape. Had that simple request been made with a statement that he would be unavailable to listen to the tape until later in the evening, a court order could have been obtained to seize the tape, and the tape would have been preserved for the benefit of the Court and the appellants.

At the point in the trial that the tape was made known to the Government prosecutors, the Government had impeached its key witness, Mahl, and impeached another important Government witness, Charles Lacoste, and had impeached yet another Government witness, Nina Bankston. The only surviving Government witness whom we submit was an important and vital witness to the Government's case, Toranto, had not been impeached. This tape, therefore, would have impeached the only remaining Government witness and would have totally discredited his testimony and perhaps would have caused the jury to throw his testimony out completely. An analysis of the testimony and of the jury's verdict shows that the jury believed Toranto, because Toranto testified that he was introduced to Mahl by Miranne, Jr., that Miranne, Sr., did not really come into the picture until after the first 24 loans were consummated. Mahl, on the other hand, testified that Miranne, Sr., introduced him to Toranto before the first 24 loan transactions. The jury found Miranne, Jr., guilty on all counts and acquitted Miranne, Sr., on all counts relating to the first 24 loans. The jury apparently concluded that Toranto was testifying truthfully and even disregarded the

documentary evidence which showed that Miranne, Sr., had, in fact, passed the act of sale on the first 24 properties.

Appellants filed timely *Brady/Giglio* motions with the specificity required by *United States v. Agurs*, 427 US 97, 96 S.Ct. 2392, 49 L.Ed. 342. Appellants asked for all evidence within the possession of the Government affecting the credibility of Government witnesses, and it became the duty of the Government to advise the attorneys for the defendants that Mahl, then a Government witness, had informed the Government that Toranto was lying as aforesaid. Mahl testified at trial that he clearly told the Government several times that Toranto was not being truthful, and that Toranto knew all along that he was purchasing the property. In response to appellants' *Brady/Giglio* requests and *Jencks Act* requests, the Government produced "no material" concerning Mahl. As to Toranto, the Government only produced his grand jury testimony which was merely a return on records and his statements before the Federal Home Loan Bank Board.

The Government's duty to disclose and preserve exculpatory evidence is clearly set forth in this Court's landmark decisions of *Brady v. Maryland*, 373 US 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1973) and *Giglio v. United States*, 405 US 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972). The *Brady* and *Giglio* decisions, *supra*, have to an extent been qualified by this Honorable Court in *United States v. Agurs*, 427 US 97, 96 S.Ct. 2392, 49 L.Ed. 342, in which it was held that a certain degree of specificity must be follow-

ed in requests for information under the *Brady* and *Giglio* decisions.

It is undeniably true that one Government witness stating that another Government witness is lying in his testimony would have an adverse effect upon the credibility of the Government witness whose truthfulness is questioned by his brother witness. The fact that Mahl had from the outset insisted that Joseph Toranto was lying and that this fact was not furnished to the defense by the Government is in flagrant violation of the *Brady/Giglio* doctrine.

The Third Circuit in *United States v. McCrane*, 527 F.2d 906, at 912 (1975), held that it was error for the Government to withhold material which would have assisted the defendant in casting doubt on the credibility of a crucial witness against him. See also, *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980), in which a new trial was granted when the Government permitted to go uncorrected its witness' false testimony to the effect that he had had only one previous felony conviction.

The *Auten* decision clearly states that the prosecution is obligated to disclose *Brady* material not actually in its possession, and yet capable of being reduced to its possession. In the instant case, Mahl, the "owner" of the tape in question, was a Government witness, and the tape in his possession was subject to seizure by the Government with whom he had an ongoing relationship.

We submit to the Court that the Government acted unreasonably in not making a simple request which would preserve a most vital piece of evidence in this case. The tape recording is lost forever. That piece of demonstrative evidence speaks louder than anyone's recollection of what was on the tape. Reasonable people can differ in their memories of the contents of the tape. The jury could completely disbelieve Mahl because of Mahl's incredulous position at this time, having been indicted for perjury after having been a Government witness. To call Mahl as a witness for the defense and ask him the contents of the tape would be a useless and vain thing, since the Government has attacked him and now indicted him, and is now attacking the authenticity of the tape itself. We respectfully submit that on a retrial, the jury might even believe that Mahl made the whole tape up or in some fashion doctored previous tapes to make it sound like a tape made at the time of the original 24 loan transactions. With the destruction of the tape, the defense was not given the opportunity to prove the authenticity of the tape and to prove that Toranto was lying.

It is respectfully submitted that the Government failed in its duty under *Brady v. Maryland*, after specific requests had been made by the defendants in two respects: the Government first did not produce and notify counsel for the defendant that Mahl insisted that Toranto was lying, and secondly, the Government failed to take steps to preserve the tape recording which could have assisted the defense in showing that Toranto was committing perjury.

The convictions of appellants should be reversed.

II. WHETHER A CONVICTION SUPPORTED LARGELY BY PERJURED TESTIMONY, WHICH IS KNOWN BY THE GOVERNMENT, SHOULD BE ALLOWED TO STAND.

Federal prosecutors are under an affirmative obligation, not merely to avoid using perjured testimony, but also to correct false testimony by its witnesses. Furthermore, prosecutors may not vouch for the credibility of their witnesses. We respectfully submit whereas in the instant case a federal prosecutor transgresses both prohibitions, manifest error exists and a conviction cannot stand.

The text of the closing argument made by counsel for the Government makes it abundantly clear not only that there was no admission, either tacit or otherwise, by the Government that the witness Toranto had lied, but on the contrary, that there was an effort by the Government to have the jury believe this witness whom the Government knew very well had perjured himself. When the United States Attorney, having been given the opportunity to hear the tape recording referred to earlier, refused and relied upon the word of the Federal Public Defender, Jack Mulvehill, the United States Attorney was charged with the knowledge of the contents of the tape. Such knowledge and contents clearly place the United States in a position of knowing that one of its important witnesses had committed perjury.

During the closing argument of defense counsel, Mr. Richard argued that the tape recording contradicted and impeached Joseph Toranto. (Vol. 12, Page 35-36.) In Mr. Burns' opening summation, he argued that Mr. Toranto was a credible witness. Mr. Schatzow in closing argument argued, Vol. 12, page 81:

> "The worst thing that has been said in this Court, in two weeks, is what I have listened to today about the attacks (by Dymond and Richard) on Joe Toranto, and the reason it is so bad, ladies and gentlemen, there are two reasons for it...

In his closing summation, Mr. Schatzow argued that the tape recording was not in evidence and that Mahl's testimony about its contents was as incredible as his other uncorroborated testimony was argued to be (Vol. 12, page 82). Mr. Schatzow argued that neither the jury, he, Mr. Collignon (FBI agent) nor Mr. Burns (Assistant U.S. Attorney) heard the tape. He conveniently left out the fact that Mr. Volz (the U.S. Attorney) had been offered the opportunity to hear the tape but had declined to do so. (Vol. 12, Page 82.)

The law is clear that federal prosecutors may not stand by silently while a Government witness gives false testimony:

> "In *Napue v. Illinois*, 1959, 360 US 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217, the Supreme Court made clear in no uncertain terms that due process is violated when the prosecutor obtains a convic-

> tion with the aid of false evidence which it knows to be false and allows to go uncorrected. *It is immaterial whether or not the prosecution consciously solicited the false evidence. It is also immaterial whether the false testimony directly concerns an essential element of the Government's proof or whether it bears only upon the credibility of the witness.* In *Napue*, '(t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' 360 US at 269, 79 S.Ct. at 1177." *United States v. Barham*, 595 F.2d 231, 241-42 (5th Cir. 1979) (Footnote omitted; emphasis added).

As noted in *Barham*, the foregoing prohibition does not merely proscribe the solicitation of perjury, but requires the Government affirmatively to correct any false testimony given by its witnesses at trial. See, e.g., *United States v. Fontenot*, 628 F.2d 921, 924 (5th Cir. 1980) and *United States v. Iverson*, 637 F.2d 799 (D.C. Cir. 1980).

The Government's obligation in this regard arises not only where it knows that its witness is giving false testimony, but also where it should know that its witness is giving false testimony. "The Government may be responsible even if the prosecutor did not actually know the testimony was perjured, but should have known." *United States v. Runge*, 593 F.2d 66, 73 (8th Cir. 1979). *See also: Giglio v. United States*, 405 US 150 (1972); *United States v. Agurs*, 427 US 97, 103 (1976).

We respectfully submit that there is a minimal showing of materiality necessary for a reversal of convictions obtained with the aid of false testimony. Reversal "is required if 'the false testimony could...in any reasonable likelihood have affected the judgment of the jury'..." *Giglio v. United States, supra,* 405 US at 154, quoting *Napue v. Illinois,* 360 US 264, 271 (1959).

> "(T)his 'reasonable likelihood' standard of materiality is a 'low threshold' standard...It is a brother, if not a twin, of the standard ('harmless beyond a reasonable doubt') for determining whether constitutional error can be held harmless ....A strict standard is appropriate because, as the Supreme Court has explained, false testimony cases involve not only 'prosecutorial misconduct,' but also 'a corruption of the truth-seeking function of the trial process,' *United States v. Agurs,* supra, 427 US at 104, 96 S.Ct. at 2397. *United States v. Barham,* supra, 595 F.2d at 242."

Where as in the case at bar, the nondisclosure bears upon the testimony of a key witness, the 'reasonable likelihood' standard invariably requires a reversal. *See, e.g., Giglio v. United States, supra; United States v. Barham, supra:*

> "In this case, in which credibility weighed so heavily in the balance, we cannot conclude that the jury, had it been given a specific reason to discredit the testimony of these key Government witnesses, would still have found that the Government's case and Barham's guilt had been established beyond a reasonable doubt. We therefore reverse Barham's convictions...*United States v. Barham,* F.2d at 243.

In *Miller v. Pate*, 386 U.S. 1 (1967), a prosecutor adduced false evidence that stains on a pair of undershorts were blood and then made frequent reference to the "bloody shorts" during the trial. The "bloody shorts" made the circumstantial case against the defendant strong. Following the trial, the defense had the shorts analyzed and the stain was found to have been paint, not blood. Because the prosecution's theory of the case relied upon the "consistent and repeated misrepresentation" that the stain was caused from blood, and citing a then long history of reversals for such a cause, this Honorable Court reversed that conviction.

The instant case is very much like *Miller* in that the prosecution, knowing the contents of the destroyed tape recording, argued to the jury the credibility of Joseph Toranto. This was a deliberate misrepresentation of which the Government was able to avail itself in rebuttal argument only because it had kept the unassailable testimony of Mulvehill from the jury by succeeding in its objection that such testimony would have been hearsay. The suggestion by the prosecutor that Mulvehill could have testified about the tape was nothing short of a deliberate misrepresentation to the jury that the tape did not say what Mahl said it did. The Government asked the jury to believe only testimony by Mahl which had been corroborated and then took advantage of the Court's ruling (as will be further commented upon *infra*) excluding the corroborative evidence to have the jury infer that Mahl's testimony was not worthy of belief. Combined with the

holdings in *Miller, supra*, and *Ellis, Garza and Sanfilippo, infra*, this was a forbidden "use" of false testimony of Toranto which is proscribed in *Napue* and *Barham, supra*.

In light of the foregoing principles, the prosecutor's failure in the case *sub judice* to take corrective measures after the tape of Toranto's earlier conversation with Mahl was brought to the Government's attention vitiates the conviction. This was not, after all, a case wherein the prosecution first learned of its witness' false testimony after the trial. At the time it learned of the tape, the Government was still conducting its case-in-chief. Hence, it could have recalled Toranto to the stand. *See: United States v. Fontenot, supra*. Nor is it of any significance that the existence of the tape was revealed to the United States Attorney, rather than to his Assistant actually conducting the trial. *Giglio v. United States, supra*. By acknowledging to Mahl's attorney that he would not question the existence or contents of the tape, the United States Attorney effectively foreclosed the Government from denying that Toranto's testimony was false. Hence, the prosecutor's failure to take corrective measures at trial constituted error.

Where the nondisclosure aids the testimony of a "key" Government witness, the standard enunciated in *Giglio* invariably requires reversal of the conviction. *United States v. Barham, supra*, at 243.

The error was not restricted to mere nondisclosure, moreover, but was compounded by the prosecutor's repre-

sentation to the jury that Toranto was a credible witness.

In his closing argument, Assistant U.S. Attorney Schatzow made statements which were unquestionably supportive of a contention that Toranto's testimony was truthful. He said that no member of the U.S. Attorney's Office had even heard this tape, that it was never tested for authenticity, that the only person who contradicted Toranto's testimony was Mahl and that Mahl was not worthy of belief. He even called Mahl a double-agent, indicating the defense was given an opportunity to listen to the tape and the Government was not, knowing full well that Volz had been offered the opportunity to listen to the tape and had refused. The Assistant U.S. Attorney was attempting to induce the jury, and he so argued, to believe the testimony of Toranto in its entirety.

The Government concealed from the jury, during its rebuttal argument after which defense counsel had no further opportunity to address the jury, that Mulvehill's inability to testify about the contents of the tape recording and thus corroborate Mahl's testimony was caused by the Court's ruling on the Government's hearsay objection. The prosecutor inferred that defense counsel could have testified about the tape's contents but had not done so. The prosecutor did not disclose that he would have made the same hearsay objection if counsel had attempted to testify about the contents of the tape recording. The prosecutor deceived the jury when he argued that he did not know what was on the tape recording. He had heard the ac-

counts of Messrs. Volz, Mulvehill, and Mahl, all of which were consistent. He had also heard the declarations by defense counsel about what they had heard, which declarations were not contradicted by Mulvehill or Mahl. Despite denying knowledge of the tape's content, Schatzow made the direct statement that the Government's case was not benefitted by the destruction of the tape. He inferred that Mahl may even have falsified the tape recording.

Prosecutors' "(a)ttempts to bolster a witness by vouching for his credibility are normally improper and error." *United States v. Ellis*, 547 F.2d 863, 869 (5th Cir. 1977). *See: e.g., United States v. Garza*, 608 F.2d 659 (5th Cir. 1979) (reversing a conviction for, *inter alia*, improper arguments by the prosecutor that the Government's witnesses were credible, holding that, even though the defendant's attorney had failed to object to these arguments, they were plain error.)

Illustrative of the prosecution's cumulative error in the instant case is *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977). There, the prosecution not only failed to correct its witness' false denial on cross-examination that he had been promised leniency in exchange for his testimony, but also argued his credibility in closing argument. These two actions in conjunction constituted reversible error.

Similarly, in *United States v. Bigeleiser*, 625 F.2d 203 (8th Cir. 1980), the Court reversed a conspiracy convic-

tion where the prosecutor not only failed to correct the false testimony of a co-conspirator who became a witness for the Government, but also implied that the witness was credible during summation.

Upon learning of the contents of the tape and that its remaining important Government witness had committed perjury, the Government had several options: it could have abandoned the prosecution, it could have moved for a continuance, or it could have moved for a mistrial. The Government, however, chose to go on with its prosecution and even chose to argue to the jury the perjured testimony.

In this case, as in all cases, the jury was entitled to be informed of all pertinent facts. It would have been very easy for the United States Attorney to have issued a subpoena duces tecum for the tape in question, had it presented to the jury, and permitted the jury to consider it along with the other evidence in determining whether or not Joseph Toranto was worthy of their belief. This action has now been rendered impossible as the tape has been destroyed and, therefore, in order to preserve the integrity of the prosecutorial process of the United States, the convictions appealed from should be reversed.

III. WAS THE EVIDENCE INVOLVING THE PERJURY COUNTS TAINTED?

The two perjury counts, against Miranne, Sr., are based upon two separate statements made to examiners of

the Federal Home Loan Bank Board (FHLBB) while Miranne was under oath in connection with an examination by the FHLBB.

The Government alleged that Miranne's statements were untrue for two reasons. First, that he was a partner with Mahl in the real estate transactions upon which the other counts of the indictment are based; and, secondly, that a transaction proposed by Mahl in connection with Metairie Towers, a complex owned by Miranne, Sr., with other partners, which transaction never got off the ground, amounted to a business dealing or a financial transaction or dealing with Mahl.

Was there a partnership? At the outset, it should be remembered that the Government impeached practically every material witness that they placed on the stand.

What does the documentary evidence show in regard to the existence or non-existence of a partnership between Miranne, Sr. and Mahl?

(a) Government Exhibit 145(a), is an engagement letter which according to Government witness, Charles Lacoste, outlined an agreement under the terms of which his CPA firm was to be retained to do work for a proposed partnership. This engagement letter is not addressed to Miranne, Sr., he is not even mentioned in the letter, and he never received either the original or a copy thereof.

(b) At the time of the alleged partnership formation, Lacoste was a member of the CPA firm of Trahan, Kernion and Derbes. Several conferences were held with Lacoste in connection with a proposed partnership, and none of said conferences were attended by Miranne, Sr. Further, he was never billed for any services in connection with these conferences, the payment for said services having been made by Mahl.

(c) The $50,000 check allegedly representing one-half of the "front money" on one of the real estate transactions was payable to Miranne, Jr., and not Miranne, Sr. Mahl could not explain this fact.

(d) The evidence clearly shows that Miranne, Sr., did not derive any of the benefits that would have been expected to flow to a partner or co-owner of real estate. He did not receive any of the rental income from the properties. He did not receive any of the profits when individual properties were sold. He did not get the benefit of any depreciation on his income tax returns.

(2) Defense Exhibit 1 is a $130,000 note from Mahl to Security Homestead in satisfaction of the loss that the Homestead had incurred on the transactions involved in the indictment. A person like Mahl would be unwilling to obligate himself for this entire loss if he had a partner who was liable for a substantial part of it.

The documentary evidence did not prove that

Miranne, Sr., and Mahl were partners in the real estate transactions in question. This being the case, it is equally obvious that the jury must have relied upon the testimony of witnesses or a witness in being convinced of the existence of the partnership. A reading of the testimony of Mahl shows that it is inconceivable that the jury could have relied on his testimony. The man was thoroughly impeached, and every member of the jury was so convinced. This leaves only the testimony of Toranto upon which the jury could have relied. Had the Government acted properly, this witness, Toranto, would have been shown to be equally as unworthy of belief as was Mahl.

Under these circumstances, the impropriety of the actions of the prosecutors in failing to expose the perjured testimony of Toranto to the jury and in arguing the credibility of that witness, knowing him to have perjured himself, is applicable to these counts as well as to the other counts of the indictment.

We will never know just what influence the testimony of Toranto, coupled with the fact that it was buttressed by the Government, had upon the jury, and the vital importance of the preservation of the integrity of our judicial system does not permit speculation on this question. As was said by this Honorable Court in *Giglio v. United States, supra,* quoting *Napue v. Illinois, supra,* "Reversal is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury." This principle was adhered to in *United States v.*

Agurs, supra, and *United States v. Barham, supra.* Did Mahl's telephone call to Miranne, Sr., in regard to Metairie Towers constitute a business dealing or a financial transaction or dealing with Mahl?

It is submitted that this telephone call which was placed by Mahl to Miranne, Sr., was nothing more or less than Mahl attempting to persuade business from Miranne, Sr. to enter a business dealing with him, but without success.

The Government attempted to prove that this telephone conversation constituted a dealing or transaction between Mahl and Miranne, Sr., by introducing a tape recording of said conversation (Government Exhibit 107(a), Transcript Exhibit 107(b)), and by the testimony of two examiners for the FHLBB, DeCuir (Volume 10, Pages 14-32), and Bender (Volume 10, Pages 33-43).

DeCuir was asked specifically whether in the course of his examination he had asked Miranne, Sr., whether he had ever planned or discussed business transactions or dealings with Mahl. He answered this in the negative. (Volume 10, Page 30). He was further asked the following question, "Now, if a real estate man had called Mr. Miranne and tried to work up a deal in connection with property that Mr. Miranne owned and Mr. Miranne didn't take him up on it, would you have called that a financial transaction? Would you call that a business deal that he was involved in with the person who called him? DeCuir

answered as follows: It wouldn't be a financial transaction. It would be a proposed transaction." (Volume 10, Pages 30-31).

The other FHLBB examiner, William Bender, followed DeCuir on the witnes stand. Bender admitted under cross-examination that he had never asked Miranne whether he had ever had any business discussions with Mahl.

The following exchange took place between counsel for Miranne, Sr., and the witness, Bender:

> Q: "Now, if Mr. Mahl had called Mr. Miranne, Sr. and proposed a business deal to him and nothing ever came of it, would you say that Mr. Miranne had been involved in a business deal with Mr. Mahl?
>
> A: No, sir.
>
> Q: You would not? If Mr. Mahl had called Mr. Miranne, Sr. and proposed the putting of a dummy mortgage on property belonging to Mr. Miranne but nothing ever came of it, Mr. Miranne never agreed to it, would you call that a business deal?
>
> A: No, I would not.
>
> Q: If Mr. Mahl as a real estate broker or agent had called Mr. Miranne and tried to hustle business, that is, get to sell a piece of property belonging to Mr. Miranne, and nothing ever came of it, would you call that a business deal?

A: No, I would not." (Volume 10, Page 38)

While counsel is well aware that these two Government witnesses cannot be called upon to decide the case, and that their interpretation of answers given by Miranne in response to their questions are not binding upon the jury, counsel does feel and earnestly represents that the obvious weakness of the Government's position in claiming that this taped conversation proved perjury makes it even more apparent that the jury must have depended upon the testimony of Toranto and/or Mahl in arriving at their verdict.

The authorities cited above, under these circumstances, demand that the verdict of the jury be reversed.

CONCLUSION

> "Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States, supra.*

A conviction which is based upon perjured testimony has a chilling effect upon the administration of justice. To allow the Government to espouse unto itself the perjured testimony of one of its witnesses is indeed incompatible with the rudimentary demands of justice. The perjured testimony of Toranto when viewed in the light of the other key witnesses who were impeached by the Government is crucial.

Federal prosecutors are under an affirmative obligation not merely to avoid using perjured testimony, but also to correct false testimony by its witness. Further, federal prosecutors may not vouch for the credibility of their witnesses. Where, therefore, a federal prosecutor transgresses both prohibitions, manifest error exists, and a conviction cannot stand.

To permit prosecutors to violate these basic and all important principles endangers the public confidence in the integrity of our entire judicial system. This cannot be permitted.

To remedy the denial of due process to petitioners, petitioners respectfully request that the Court issue a writ of certiorari, vacate the conviction and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Petition of Certiorari has been served on the Solicitor General of the United States, Room 5614, Department of Justice Building, Washington, D.C. 20530, by hand on December 1, 1982.

Don M. Richard

COUNSEL FOR PETITIONER

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF LOUISIANA

Filed 8-12-81

United States of America vs.

DEFENDANT

EDMOND G. MIRANNE DOCKET NO. CRM. 81-30

**JUDGMENT AND
PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH DAY YEAR
August 12, 1981

COUNSEL

☐ **WITHOUT COUNSEL**

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **WITH COUNSEL**

F. Irvin Dymond, Esq.
(Name of Counsel)

☐ **GUILTY**, and the court being satisfied that there is a factual basis for the plea,

PLEA

☐ **NOLO CONTENDERE,**

☐ **NOT GUILTY**

☐ **NOT GUILTY.** Defendant is discharged

There being a verdict of

☒ **GUILTY.** to counts, 1, 26 through 51, 76 through 103

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of Title 18, U.S.C., Section 2; Title 18, U.S.C., Section 371; Title 18, U.S.C., Section 657; Title 18, U.S.C., Section 1014; Title 18, U.S.C., Section 1621

CONSPIRACY, FALSE STATEMENTS, MISAPPLICATION OF FUNDS, AND PERJURY AS CHARGED IN THE INDICTMENT

The court asked whether defendant had anything to say why judgment should

not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to each of counts 1, 26 through 51, 76 through 103 inclusive, to run concurrently with each other. Execution of these sentences is suspended as to each of counts 1, 26 through 51, 76 through 103 and the defendant is placed on probation for a period of three (3) years as to each of those counts. All sentences of probation are to run concurrently.

SENTENCE OR PROBATION ORDER

IT IS FURTHER ORDERED that as to each of counts 1, 26 through 51, 76 through 103 inclusive defendant pay a fine of $500.00, or a total of $27,500.00 in fines.

IT IS FURTHER ORDERED that as special conditions of probation: (1) defendant pay the fines in the total amount of $27,500.00 within six (6) months, (2) within thirty (30) days make

SPECIAL CONDITIONS OF PROBATION

restitution to Security Homestead Association in the amount of $130,000.00, (3) perform public service work of such nature and at such times and places as the U.S. Probation Officer may from time to time direct, for a total of 320 hours during the first year of probation.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge_____

☐ U.S. Magistrate Date August 12, 1981

A-6

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF LOUISIANA

Filed 8-12-81

United States of America vs.

DEFENDANT

EDMOND G. MIRANNE, JR. DOCKET NO. CRM. 81-30 "D"

**JUDGMENT AND
PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH DAY YEAR
August 12, 1981

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Don M. Richard, Esq.
(Name of Counsel)

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

PLEA ☐ NOLO CONTENDERE,

☐ NOT GUILTY

☐ NOT GUILTY. Defendant is discharged

There being a verdict of

☒ GUILTY. to counts 1 through 101 by the jury on April 24, 1981

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of Title 18, U.S.C., Section 2; Title 18, U.S.C., Section 371; Title 18, U.S.C., Section 657; Title 18, U.S.C., Section 1014; Title 18, U.S.C., Section 1621

CONSPIRACY, FALSE STATEMENTS, MISAPPLICATION OF FUNDS, AS CHARGED IN THE INDICTMENT

The court asked whether defendant had anything to say why judgment should

not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to each of counts 1 through 101 inclusive, to run concurrently with each other. Execution of these sentences is suspended as to each of counts 1 through 101 and the defendant is placed on probation for a period of three (3) years as to each of those counts. All sentences of probation are to run concurrently.

SENTENCE OR PROBATION ORDER

IT IS FURTHER ORDERED that as to each of counts 1 through 101 inclusive defendant pay a fine of $275.00, or a total of $27,775.00 in fines.

IT IS FURTHER ORDERED that as special conditions of probation: (1) defendant pay the fines in the total amount of $27,775.00 within six (6) months, (2) perform public service work of such nature and at such times and places as the U.S. Probation Officer

SPECIAL CONDITIONS OF PROBATION

may from time to time direct, for a total of 320 hours during the first year of probation, (3) participate in a program of treatment relating to his admitted alcoholic drinking problem.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge_____

☐ U.S. Magistrate Date August 12, 1981

APPENDIX "B"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edmond G. MIRANNE and Edmond G. Miranne, Jr.,
Defendants-Appellants.

No. 81-3484.

United States Court of Appeals
Fifth Circuit.

Sept. 27, 1982.

Defendants were convicted in the United States District Court for the Eastern District of Louisiana, at New Orleans, Edward J. Boyle, Sr., J., of conspiracy, making or causing to be made a false statement in a loan application to a federally insured savings and loan association, and misapplication, as officers of the association, of money belonging to the association, and one of them was convicted of perjury, and they appealed. the Court of Appeals, Van Pelt, District Judge sitting by designation, held that: (1) affidavit filed with the motion for recusal did not establish error in failure of judge to recuse himself on ground of bias or prejudice or on ground that his impartiality might reasonably be questioned; (2) fact that single loan application was photocopied 41 times did not render multiplicious counts with respect to the 42 loan applications; (3) there was no violation of *Brady* requirements or

due process in connection with destruction of a tape recording by government witnesses; and (4) it was not established that another government witness committed perjury or that the Government had actual or constructive knowledge of the alleged perjury.

Affirmed.

1. Judges 51(4)

Once motion is filed for recusal of judge on ground of bias or prejudice, judge must pass on the legal sufficiency of the affidavits, but may not pass on the truth of the matter alleged. 28 U.S.C. § 144.

2. Judges 51(3)

In order to be legally sufficient, affidavit in support of motion for recusal of judge on ground of bias or prejudice must meet, among other requirements, the test that the facts are material and stated with particularity, the facts are such that, if true, they would convince a reasonable man that bias exists, and the facts show the bias is personal as opposed to judicial in nature. 28 U.S.C.A. § 144.

3. Judges 51(3)

Affidavit alleging only "potential bias" and not alleging facts supporting contention that actual and

present bias existed, together with speculative argument that judge possessed bias in criminal case because his son was an attorney in lawsuit against partnership in which defendants had a small interest and that defendants had thought about bringing a civil action against judge's son was not legally sufficient to warrant recusal of judge on ground of bias and prejudice. 28 U.S.C.A. § 144.

4. Judges 49(1)

Under statute requiring judge to disqualify himself when his impartiality might reasonably be questioned, actual demonstrated prejudice need not exist in order for judge to be required to recuse himself. 28 U.S.C.A. § 455(a).

5. Judges 51(4)

In light of speculative nature of accusations of "potential bias" arising from fact that judge's son was attorney in lawsuit against a partnership in which criminal defendants had a small interest and that defendants allegedly had thought about bringing a civil action against judge's son, reasonable man would not reasonably question judge's impartiality, and thus judge did not abuse his discretion in denying motion for recusal. 28 U.S.C.A. § 455(a).

6. Indictment and Information 130

In prosecution for making or causing to be made a

false statement in a loan application to a federally insured savings and loan association and misapplication by officers of the association of money belonging to the association, fact that single loan application was photocopied 41 times to make total of 42 loan applications did not render separate counts for each loan application multiplicious, where each application was treated as distinct and placed in separate file, loans were secured by separate pieces of property, with three exceptions proven to be fraudulent at trial, separate promissory notes and mortgages were involved, and separate legal fees were paid to firm composed of the two defendants. 18 U.S.C.A. §§ 657, 1014.

7. Banks and Banking 509

In prosecution of officers of savings and loan association for making or causing to be made a false statement in loan application to federally insured savings and loan association, evidence was sufficient to prove element of knowledgeable making of false statement by applicant as to each of 42 loans, though one loan application signed by him was photocopied 41 times. 18 U.S.C.A. § 1014.

8. Criminal Law 1167(2)

Assuming that counts in indictment were multiplicious and that there should have been nine counts instead of 50 with respect to making false statements in loan applications to federally insured savings and loan association, there was no prejudice to defendants.

9. Criminal Law 700

Under *Brady*, the government is not obligated to furnish a defendant with information which he already has.

10. Criminal Law 700

There was no dereliction of prosecutorial duty to preserve exculpatory material as required by *Brady v. Maryland* in connection with destruction of tape recording by prosecution witness, either in failing to immediately seek seizure of the tape after learning thereof or in failing to inform defense counsel of the existence thereof, where United States attorney informed court of the tape shortly after its existence was revealed to him, and his failure to immediately inform defense attorneys of the tape was justifiable considering his report to the court, the late hour, that a meeting with defense attorneys was already planned for the next morning, and that neither United States attorney nor the court was aware that witness was contemplating destruction of the tape. Fed. Rules Crim. Proc., Rule 16(g), 18 U.S.C.A.

11. Constitutional Law 268(5)

Destruction of tape recording by prosecution witness did not result in violation of due process where no negligence or bad faith on the part of the prosecution existed, actual content of the tape was highly speculative and witness was allowed to fully relate and explain his recorded

conversation at trial, and evidence of guilt at trial was sufficient to prove defendants' guilt. U.S.C.A. Const. Amend. 5.

12. Criminal Law 706(2)

Neither contradiction between portions of testimony of two government witnesses nor alleged contents of tape recording which one of the witnesses had destroyed were sufficient to demonstrate that the other witness had perjured himself or that the Government had knowledge of such perjury.

13. Criminal Law 742(1)

Generally, credibility of witnesses and weight to be given their testimony are questions within the province of the jury.

14. Criminal Law 1171.8(1)

Knowledge by the Government of alleged perjury of prosecution witness would have been prerequisite to reversal in the instant case and, in any event, little or no prejudice could be attributed to such testimony in light of thorough cross-examination of prosecution witness whose testimony allegedly indicated perjury in testimony of second prosecution witness.

15. Criminal Law 1171.8(1)

Perjury conviction was not tainted by alleged perjury of prosecution witness on another issue.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE and JOHNSON, Circuit Judges, and VAN PELT*, District Judge.

VAN PELT, District Judge:

Appellants Edmond G. Miranne (hereinafter referred to as Miranne, Sr.,) and Edmond G. Miranne, Jr., appeal their convictions of April 24, 1981, in the district court[1] which were based on a 103 count indictment. Count 1 charged Miranne, Sr., Miranne, Jr., and Burt Mahl, III, with conspiracy, 18 U.S.C. 371 (1976), in violating 18 U.S.C. §§ 657, 1014 (1976). Counts 2-51 charged the defendants with the substantive offense of making or causing to be made a false statement in a loan application to Security Homestead Association, a federally insured savings and loan association, in violation of 18 U.S.C. §§ 1014[2] and 2

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* District Judge of the District of Nebraska, sitting by designation.

[1] The Honorable Edward J. Boyle, United States District Judge for the Eastern District of Louisiana presiding.

[2] 18 U.S.C. § 1014 provides in pertinent part:

(1976). Counts 52-101 charged Miranne, Sr., and Miranne, Jr., as officers of the association, with the misapplication of money belonging to the association in violation of 18 U.S.C. §§ 657[3] and 2 (1976). Counts 102 and 103 charge only Miranne, Sr., with perjury in violation of 18 U.S.C. 1621 (1976).

Defendant Mahl entered a plea of guilty to count 1, the conspiracy charge, and agreed to serve as a witness for the government against the Mirannes. Miranne, Jr., was found guilty by a jury on counts 1-101. Miranne, Sr., was found guilty by the same jury on counts 1, 26-51, and 76-103.

On August 12, 1981, Miranne, Sr., was sentenced to two years imprisonment on each of the 55 counts, the terms to run concurrently, and fined $27,500. The execution of the prison sentences was suspended and Miranne, Sr., was placed on three years probation. As a condition of

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(Footnote 2 continued)

> Whoever knowingly makes any false statement or report ... for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ... upon any application ... or loan ... shall be fined not more than $5,000 or imprisoned for not more than two years or both.

[3] 18 U.S.C. § 657 provides in pertinent part:

> Whoever, being an officer ... of or connected in any capacity with ... any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation ... willfully misapplies any money ... belonging to such institution or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years.

probation, he was ordered to pay $130,000 in restitution to the savings and loan association and to perform 320 hours of public service work.

Miranne, Jr., was sentenced to two years imprisonment for each of the 101 counts, sentences to run concurrently, and fined $27,775. Execution of the prison terms was suspended and three years of probation imposed. As a special condition of probation, Miranne, Jr., was ordered to perform 320 hours of public service work and to undergo treatment for alcoholism.

On appeal, appellants raise the following assignments of error: (1) the court erred in denying appellants' motion to dismiss or to compel election of counts; (2) the district judge erred in refusing to recuse himself; (3) the government failed to preserve certain exculpatory material in violation of *Brady v. Maryland;* (4) whether a conviction supported largely by perjured testimony, which is known by the government, should be allowed to stand; and (5) was the evidence involving the perjury counts tainted? We have analyzed these contentions and find no grounds for reversal. Thus we affirm the judgment of the district court. Before discussing our reasoning in this opinion, it would be helpful to briefly outline the persons and events involved.

I

In outlining the facts of this case, we must remember that our review is limited and that we must consider the

facts in light most favorable to the government. *United States v. White*, 450 F.2d 264 (5th Cir. 1971), *cert. denied*, 405 U.S. 1072, 92 S.Ct. 1523, 31 L.Ed.2d 805 (1972).

At the time of the transactions which gave rise to this prosecution, Miranne, Sr., was the president and chief executive officer of Security Homestead Association, a federally insured savings and loan association in New Orleans, Louisiana. His son, Miranne, Jr., was the association's attorney and a member of its board of directors. Burt Mahl, III, was a local real estate developer. From a review of the evidence, it appears that Mahl was in need of financing to purchase various properties in the New Orleans area. He went to the Mirannes to acquire such financing. Early in 1976, Miranne, Jr., introduced Mahl to Joseph Toranto. Toranto was a loan officer in charge of Security Homestead's Family Finance Center. Toranto was limited by state law to granting secured loans up to $10,000 for home improvement, not purchase.

Mahl applied for and received 50 loans for a total of approximately $460,000. These loans can be divided into three groups: 24 applied for on January 12, 1976; 18 on February 20, 1976; and 8 on May 13, 1976. On each loan application, the stated purpose for the loan was to "renovate property."

Without going into detail, it is apparent that the Mirannes provided Mahl with several shortcuts from the normal loan approval procedure. In addition, it appears

that, for their efforts, the Mirannes received kickbacks from the unused proceeds of the loans, and possibly part ownership in properties which were purchased with the loan moneys.

II

In their second assignment of error, appellants argue that District Judge Edward J. Boyle erred in denying appellants' motion to recuse himself "on the grounds of potential bias and prejudice against the defendants and/or the appearance thereof...."[4] We first address the recusal issue because, if meritorious, discussion of the remaining errors would be unnecessary.

Prior to this motion for recusal, three other district judges had disqualified themselves in this case due to personal relationships with the appellants or financial interests in Security Homestead. As to Judge Boyle, the appellants alleged in an affidavit that the Judge's son, Edward J. Boyle, Jr., was one of two court-appointed attorneys representing the trustees of the bankrupt Fountainbleau Hotel Corporation in a 1976 state court civil action brought by the trustees against Fountainbleau—Orleans, a Louisiana partnership. The lawsuit was still pending at the time of the trial of this case. Appellants further alleged that the Mirannes have a 21 percent interest in the partnership. Finally, appellants alleged that "[a]s a result of the substantial claim for liability and because of [un-

[4] Motion to Recuse Judge, Record, Vol. I, at 70.

specified] actions taken by Edward J. Boyle, Jr., the trustees and others, to defendant's loss and detriment, defendant has intended for a period preceding this indictment to file a civil suit against all of said parties.[5]

[1,2] Appellants filed the motion under 28 U.S.C. §§ 144[6] and 455(a)[7]. As stated in *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975): "Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavits, but may not pass on the truth of the matter alleged." In order to be legally sufficient, the affidavit must meet, among other requirements, the following test:

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[5] Affidavit of Appellants, Record, Vol. I, at 76.

[6] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

[7] 28 U.S.C. § 455(a) provides:

> Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"1. The facts must be material and stated with particularity;

"2. The facts must be such that, if true they would convince a reasonable man that a bias exists;

"3. The facts must show the bias is personal, as opposed to judicial, in nature."

Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976), quoting *United States v. Thompson,* 483 F.2d 527, 528 (3d Cir.) *motion denied,* 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974).

[3] We agree with Judge Boyle that § 144 did not require his recusal. The affidavit only alleged a "potential bias" and did not allege facts which support the contention that an actual and present bias existed. In addition, the argument that Judge Boyle possessed a bias because his son was an attorney in a lawsuit against a partnership in which the appellants had a small interest without demonstrating what beneficial effect, if any, the conviction of the appellants would incur upon Boyle, Jr., is far too speculative to convince a reasonable man that a bias existed. The same conclusion is applicable to the appellants' allegation that, for some time, they had thought about bringing a civil action against Boyle, Jr. The civil action against the Fountainbleau partnership had been in existence for five years at the time the motion for recusal was filed. The fact

that the appellants had not brought the threatened action against Boyle, Jr., during that time raises serious question as to the weight to be given appellants' allegation.

[4,5] Section 455(a) is a self-enforcing statutory standard for disqualification of a judge. *Davis, supra* at 1051. It is broader than § 144 in that it requires a judge to disqualify himself when "his impartiality might reasonably be questioned." thus, under § 455(a) an actual demonstrated prejudice need not exist in order for a judge to be required to recuse himself. "Section 455(a) is a general safeguard of the appearance of impartiality and establishes a 'reasonable factual basis-reasonable man' standard." *Fredonia Broadcasting Corp., Inc. v. RCA Corp.*, 569 F.2d 251 (5th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978). Because of the speculative nature of appellants' allegations, we hold that a reasonable man, viewing the facts as they stood at the time of the motion, would not reasonably question Judge Boyle's impartiality and that Judge Boyle did not abuse his discretion in denying the motion for recusal.

III

In their first assignment of error, appellants contend that, as to the first 42 loans and the corresponding charges (counts 2-43 and 52-93), the counts in the indictment were multiplicious and that the court should have granted appellants' motion to dismiss the indictment or to compel election of counts. Appellants' argument is based on the

fact that the first loan application, signed by Mahl, was photocopied 41 times to make up a total of 42 loan applications for different pieces of property.

On January 12, 1976, the first loan application was filled out by Toranto and signed by Mahl. Toranto then had this loan application photocopied 23 times to make up the 24 applications in the first group. Each of these applications was placed in a separate loan file. In addition, each loan was secured by a separate and distinct property which Mahl claimed he owned but which instead he purchased with the loan money.

On February 20, 1976, Mahl applied for and received 18 additional loans with which he purchased 15 properties. On this occasion, the application procedure was similar to that used for the first group of loans except that Mahl did not physically sign any of the applications. Instead, someone in the Home Finance Center other than Toranto photocopied the original application, altered the date, and then created 18 copies which were filed in the same manner as the first group.

Based on these facts, appellants argue that, as to the first 42 loans, there was only one false statement which was photocopied 41 times and that if any criminal liability exists, it is only in relation to the original application. Therefore, they argue, the 42 counts each of making a false statement and misapplication of the loan proceeds are multiplicious. The evil which appellants perceive and seek

to correct is based on their concern that "the repeated assertion of the details of a singular course of conduct in multiple counts will prejudice the defendant and confuse the jury by suggesting that not one but several crimes have been committed." *See e.g. United States v. Hearod*, 499 F.2d 1003, 1005 (5th Cir. 1974).

This case is unlike cases where multiple charges for several false statements in a single document were held to be multiplicious. *See United States v. Sue*, 586 F.2d 70 (8th Cir. 1978); *United States v. Sahley*, 526 F.2d 913 (5th Cir. 1976). Neither is it like cases where the intended unit of prosecution is unclear. *See United States v. Mason*, 611 F.2d 49 (4th Cir. 1979); *United States v. Long*, 524 F.2d 660 (9th Cir. 1975). Here, the unit of prosecution is specifically defined. Title 18 U.S.C. § 1014 proscribes the making of "any false statement or report."

[6,7] We do not agree with appellants that the case at hand is one of a single false statement and a single transaction. Instead we find that the indictment correctly charged appellants with 42 false statements in 42 separate transactions. The fact that a photocopier was used to save Mahl and/or the appellants from the inconvenience of filling out and signing 42 separate loan applications is not sufficient to reduce their actions to a single crime. Each of the 42 loan applications was treated as distinct from the others. The applications were placed in separate files. The loans were secured by separate pieces of property, with three exceptions proven to be fraudulent at trial. Separate promissory

notes were issued for each loan. In addition, 42 separate mortgages were recorded by Security Homestead and separate loan checks issued. Separate legal fees for the processing of each loan were paid to Security Homestead's law firm, composed of Miranne, Sr., and Miranne, Jr. Finally, Mahl's original signature appears at least six times per file on documents relating to each loan and attached to the loan application.[8]

In light of these facts, we hold that the individual counts relating to the 42 loan applications were justified and that the court did not err in denying appellants' motion to dismiss or compel an election of counts.

[8] Assuming. arguendo, that the counts in the indictment were multiplicious, we have difficulty understanding how these charges improperly prejudiced the appellants' case. The first assignment of error does not challenge the counts relating to the last eight loan applications which were separately and individually signed by Mahl. Even if we agreed with appellants' argument that only the original

[8] Appellants imply that no evidence was presented to the jury showing that Mahl had knowledge that the one application which he signed was photocopied 41 times and thus, as to the 41 counts, insufficient evidence was produced to prove the knowledgeable making of a false statement which is a necessary element of the crime charged. *United States v. Lentz*, 524 F.2d 69 (5th Cir. 1975), *rehearing denied*, 526 F.2d 815 (5th Cir. 1976). Mindful that our review is limited, *United States v. Klein*, 560 F.2d 1236 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978), we find appellants' argument is without merit. In his testimony, Mahl admitted to signing separate sets of documents for each loan. This, along with those documents which are attached to each loan file and were admitted into evidence, is sufficient to prove the element of knowledge required.

loan was subject to prosecution, the counts for that first loan, plus the counts relating to the last eight loans, would still come to a total of nine counts each for the making of a false statement and the misapplication of loan moneys. We see the difference in the degree of potential prejudice between nine counts and fifty to be diminutive.

IV

[9] In the third assignment of error, appellants contend[9] that the government failed in its duty to preserve certain exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1973) and that, as a result of this breach, the court erred in denying appellants' motion for judgment of acquittal notwithstanding the jury's verdict or, alternatively, for a new trial based upon the destruction of evidence.

Appellants' argument is based on the following facts. On Monday, April 20, 1981, at approximately 2:00 P.M. and during the trial of the appellants, Mahl played for John T. Mulvehill, the public defender who was representing him, a tape recording which was purported to be a con-

[9] Appellants also contend that the government failed in its duty to inform defense counsel that Toranto lied concerning Mahl's statement as to the purpose of the loans. There is no evidence that the government possessed knowledge of Toranto's alleged lies. In addition, it is apparent from the record that defense counsel knew, perhaps better than the government, that Mahl had contradicted his own story and would testify on the stand that he had told Toranto the true purpose of the loans. We find appellants' argument to be without merit. Under *Brady*, the government is not obligated to furnish a defendant with information which he already has. *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979).

versation between Mahl and Toranto. During that conversation, Mahl allegedly told Toranto that he needed the loans to be rushed through because the purchase agreement on the properties was about to expire. Mulvehill encouraged Mahl to bring the tape to the attention of the court and parties in this case. Mahl did agree to play the tape for United States Attorney John Volz, but not for his assistants.

Mulvehill met with Volz at about 4:00 P.M. that same afternoon at which time he advised Volz of the contents of the tape and Mahl's offer that Volz be allowed to hear the tape. Volz stated that it would be unnecessary for him to hear the tape since Mulvehill had related the contents to him. Both men agreed that the court should be advised as to the existence of the tape and Volz stated that he would do so.

Shortly thereafter, Volz met with his assistants and the three of them then informed Judge Boyle of the existence of the tape. Judge Boyle advised Volz to contact Mulvehill and to have him attend a previously scheduled conference, which included appellants' attorneys, the next morning, Tuesday, April 21, 1981, at 8:30 A.M.

Appellants' attorneys were in the courthouse at the time of this initial conversation between Volz and Judge Boyle, but were not informed of the tape at that time.

At approximately 7:00 P.M. that same evening

(April 20), appellants' attorneys, F. Irvin Dymond and Don M. Richard, received a call from Mahl. Mahl played the tape for Dymond and Richard and then indicated that, at that very moment, he was destroying the tape.

At trial, only Mahl was allowed to testify as to the contents of the tape.

On appeal, appellants argue that, by failing to immediately seek seizure of the tape or inform appellants' attorneys of the existence of the tape, the government breached its duty to preserve exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1973) and its progeny. This evidence, they argue, would have impeached Toranto who testified that Mahl told him the purpose of the loans was to renovate property.

Brady v. Maryland, supra, holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. at 1196-1197. This due process consideration is based upon a realization of the vast resources of the prosecutor and on the desire to avoid an unfair trial to the accused. *United States v. Auten*, 632 F.2d 478, 480-81 (5th Cir. 1975). *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 7631, 31 L.Ed.2d 104 (1972) applied the *Brady* doctrine to evidence useful for impeachment purposes if such evidence

is shown to be material.

In *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976) we stated:

> The basic import of *Brady* is not that there is an abstract right on the part of the defendant to obtain all evidence possibly helpful to his case, but rather that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness.

Id. at 223.

[10] There is little question that there are occasions where the prosecution has an affirmative duty to seek out evidence to which it has access and which may be beneficial to the defense. *Auten, supra.* In this case, it would appear that once Volz was informed of the existence of the tape, his *Brady* duty was triggered. Volz began to satisfy this duty when he informed the court of the tape shortly after its existence was revealed to him. *See United States v. James*, 495 F.2d 434 (5th Cir.), *cert. denied*, 419 U.S. 899, 95 S.Ct. 181, 42 L.Ed.2d 144 (1979) (notification of court sufficient to satisfy continuing discovery duty under Fed. R. Crim. P. 16(g)). His failure to immediately inform appellants' attorneys of the tape is justifiable considering his report to the court, the late hour of the day, that a meeting with appellants' attorneys was already planned for the next morning, and that neither Volz nor the court were

aware that Mahl was contemplating the destruction of the tape. Therefore, we find that there was no dereliction of prosecutorial duty and that, as to the requirements of disclosure, *Brady* was satisfied.

[11] However, our inquiry does not end here. After deciding that the government had satisfied its *Brady* duty, we must consider whether the destruction of the tape violated the principles of due process upon which *Brady* is based. "[L]ost evidence cases are essentially permutations of failure-to-disclose cases." *Armstrong v. Collier*, 536 F.2d 72 (5th Cir. 1976). This Court continued:

> An exception for good faith loss of important evidence must not be allowed to swallow the discovery rules, and the burden of explanation on the Government must be a heavy one; but criminal convictions otherwise based on sufficient evidence may be permitted to stand so long as the Government made "earnest efforts" to preserve crucial materials and to find them once a discovery request is made.

Id. at 78, quoting *United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir. 1971).

This circuit has recognized *Bryant's* good faith exception and has adopted its three-part test for determination of whether an indictment should be dismissed due to destruction or loss of evidence. The three factors are: (1) "the degree of negligence or bad faith on the part of the government"; (2) "the importance of the evidence lost";

and (3) "the evidence of guilt adduced at trial." *Armstrong, supra* at 78.

As to the first factor, we concluded above that, in light of the particular facts the government satisfied its *Brady* duty and that no negligence or bad faith existed. The importance of the tape, in the context of the second factor, is questionable for two reasons. First the actual content of the tape is highly speculative. Neither the government prosecutors nor the court heard the tape. The only persons, other than Mahl, who heard the tape were appellants' counsel and Mulvehill, none of whom had ever before heard Toranto's voice. Second, at trial Mahl was allowed to fully relate and explain his conversations with Toranto. Because of these two reasons, we conclude that the tape was not so important that its destruction infringed upon appellants' due process rights. As to the third factor, we simply conclude that the evidence of guilt adduced at trial, including the 50 loan files and testimony of Mahl and Toranto was sufficient to prove the appellants' guilt and that the absence of the tape did not violate due process. The defense had access to Mahl prior to trial and was aware of his contention that Toranto knew the true purpose of the loans. During trial, the defense thoroughly explained the tape issue through its cross-examination of Mahl.

V

[12] We will deal with appellants' fourth and fifth as-

signments of error together. In their fourth assignment of error, appellants allege that their conviction was supported largely by perjured testimony and that the character of said testimony was known by the government.[10] Their argument is based upon the contradiction of testimony of two government witnesses, Mahl and Toranto.

At the trial in question, Mahl testified that, when applying for the loans, he told Toranto the true purpose of the loans—to purchase property. Toranto testified that Mahl told him the purpose of the loans was to renovate property. Appellants contend that the testimony of Mahl plus the alleged contents of the Mahl/Toranto tape were sufficient to demonstrate that Toranto perjured himself and that the government had knowledge of such perjury. We do not agree.

[13] First, there is no hard evidence that Toranto committed perjury. The Mahl/Toranto tape was destroyed before it could be heard by the government, authenticated, and, possibly, introduced at trial. The only evidence of perjury was in the conflict between the testimony of Mahl and Toranto. At most, this represented a contradiction in the testimony of two witnesses. Generally, the credibility of

[10] Appellants also contend that, in the closing argument, the government improperly attempted to bolster the credibility of its witness, Toranto. Certainly, such action might be improper if the government attempted to bolster the credibility of a witness who, to the government's knowledge, had committed perjury. *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977). However, in light of our discussion herein, such is not the case. Here there is no improper bolstering.

witnesses and the weight to be given to their testimony are questions within the province of the jury. *United States v. Martinez*, 588 F.2d 495 (5th Cir. 1979); *United States v. Kossa*, 562 F.2d 959 (5th Cir. 1975), *cert. denied*, 434 U.S. 1075, 98 S.Ct. 1265, 55 L.Ed.2d 781 (1978).

[14] Second, assuming, arguendo, that Toranto had perjured himself, there is no evidence that the government had actual or constructive knowledge of the alleged perjury. In this case, such knowledge would be a prerequisite to reversal. *United States v. Barham*, 595 F.2d 231 (5th Cir. 1979); *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978). In light of the destruction of the tape and of Mahl's testimony under oath when he entered his guilty plea on April 8, 1981, that he did not tell anyone at Homestead (except the Mirannes) the true purpose of the loans, no actual or constructive knowledge of perjury can be attributed to the government. In addition, even *if* Toranto had perjured himself and *if* the government had knowledge of the perjury, considering the events of trial, little or no prejudice can be attributed to such testimony. *See Anderson, supra.* Through Mahl, upon cross-examination, appellants' counsel fully explored Mahl's version of his dealings with Toranto and the alleged contents of the missing tape. We find no error in the fourth assignment.

[15] The fifth and final assignment of error relates to the conviction of Appellant Miranne, Sr., of the perjury under counts 102 and 103 of the indictment. The perjury charges are based upon two separate statements made by

Miranne, Sr., while under oath to examiners of the Federal Home Loan Bank Board (FHLBB).

The indictment specifically cited the following statements. On June 29, 1978, Miranne, Sr., testified as follows:

> "Q. ... Have you ever had *any business dealings* with Mr. Mahl? Would you explain those dealings.
>
> A. Yes, sir.
>
> Q. Would you explain those.
>
> A. I will be glad to. Mr. Mahl is in the management business, also, of apartments—management and repairs of rental property. Our Association owned and took back over a half a million dollars worth of property over in Delmont Village on the West Bank. In Delmont Village I personally own 20 duplexes. This area became depressed after the fact the Christopher Homes moved into the area, and the entire area became black.
>
> * * * * * *
>
> Q. Did you have any other *financial transactions* with Mr. Mahl?
>
> A. No, sir."

(emphasis supplied).

On October 4, 1979, Miranne, Sr., was again examined and the following dialogue took place:

"Q. Were you ever in any *dealings* with Mr. Mahl?

A. No.

Q. Who did he do—did he do anything for you?

A. Oh, deals? Let me take that back. Yes, Sir. Let me take that back. He managed—managed a—I owned 20 duplexes in Delmont Village, which I have owned, I think for over ten years ....

* * * * * *

Q. Is that the only *deal* you got involved with Mahl?

A. That's all."

(emphasis supplied).

Appellant claims that the perjury convictions were based primarily on the allegedly perjured testimony of Toranto who provided the link between Mahl and the Mirannes in the loan transactions which gave rise to the substantive offenses in this case. Interestingly, appellant does not claim that Toranto's testimony concerning the relationship between Mahl and the Mirannes was perjured. Instead they argue that Toranto's testimony concerning this relationship was tainted by Toranto's allegedly perjured statements about Mahl and the loan application. According to appellant, had the government exposed the alleged perjury by Toranto, he would have proven an unworthy witness on all factual issues. In light of our above

discussion concerning the alleged perjury of Toranto, we find no merit to appellants' fifth assignment of error. This conclusion is further supported by the fact that the perjury conviction was supported by testimony of both Mahl and Toranto. Thus, there is not even a contradiction of testimony as there was in assignment four. In addition, the perjury conviction is supported by other sufficient documentary evidence which demonstrates the business relationship between Mahl and Miranne, Sr. In fact, much of the evidence at trial went to proving this relationship.

VI

In conclusion, we find no sufficient grounds for reversal among appellants' five assignments of error and, thus, affirm the convictions of both appellants.

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3484

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDMOND G. MIRANNE, SR., and
EDMOND G. MIRANNE, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion September 27, 1982, 5 Cir., 1982, __F.2d__).

(November 1, 1982)

Before GEE and JOHNSON, Circuit Judges, and VAN PELT*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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* District Judge of the District of Nebraska, sitting by designation.

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL DOCKET

versus NO. 81-30

EDMOND G. MIRANNE, ET AL SECTION: "D"

STIPULATION

It is stipulated by and between John Volz, United States Attorney, Michael Schatzow and W. Glenn Burns, Assistant United States Attorneys, and John T. Mulvehill, Federal Public Defender and counsel for Burl R. Mahl, III, F. Irvin Dymond, counsel for Edmond G. Miranne and Don M. Richard, counsel for Edmond G. Miranne, Jr. that the following is uncontroverted, true and correct:

During the representation of Burl Mahl, John T. Mulvehill, Federal Public Defender, was informed by Mr. Mahl that he had over the years recorded many conversations between himself and other parties usually without their knowledge. He was further informed that Mr. Mahl had in his possession approximately six tape recordings having some bearing on the proceeding, *United States of America v. Miranne, et al.* Mr. Mahl questioned Mr. Mulvehill extensively about the legality of his making the tapes and about his ownership rights concerning the same and his rights to dispose of them as he saw fit. Several weeks later during the week of April 13, 1981, Mr. Mahl

played for Mr. Mulvehill a tape recording of telephone conversations between himself and Assistant United States Attorneys Burns and Schatzow. On Monday, April 20, 1981, at approximately 2:00 P.M., Mr. Mahl played for Mr. Mulvehill a tape recording purporting to be a conversation between himself and Joseph Toranto of Security Homestead Association. It was Mr. Mulvehill's feeling that the tape recording should be brought to the attention of the Court and all parties to the ongoing prosecution. Mr. Mahl refused permission for Mr. Mulvehill to either retain or duplicate the tape recording. Mr. Mahl did agree, however, that he would permit United States Attorney John Volz to listen to the tape. However, he refused permission to have Assistant United States Attorney Schatzow, lead counsel, to listen to the tape recording. Mr. Mulvehill then telephoned Mr. Volz and found that he was presently unavailable as he was then involved in the trial of a matter in section "G". Mr. Mahl was advised of this fact and left Mr. Mulvehill's office with the tape recording stating he would return when and if Mr. Volz became available.

At approximately 4:00 p.m. the same afternoon, Mr. Volz appeared in Mr. Mulvehill's office. Mr. Mulvehill advised Mr. Volz of the existence of the tape, of its contents as best as Mr. Mulvehill could recall, and of Mr. Mahl's expressed willingness to play the tape for Mr. Volz. Mr. Volz advised that it would not be necessary that he hear the tape since Mr. Mulvehill had related the contents to him, and Mr. Volz and Mr. Mulvehill agreed that the Court must be advised and that Mr. Volz would do so. Mr. Volz

went to Section "D" and informed Assistant United States Attorneys Burns and Schatzow to see him immediately after they concluded for the day. Mr. Volz returned to Section "G". Shortly thereafter, Mr. Volz informed Assistant United States Attorneys Burns and Schatzow of the existence of the tape recording and the three of them met with United States District Judge Edward J. Boyle, Sr. and informed Judge Boyle of the existence of the tape recording.

Judge Boyle advised Mr. Volz, Mr. Schatzow and Mr. Burns to contact Mr. Mulvehill, and to have him attend a previously scheduled conference on Tuesday, April 21, 1981, at 8:30 a.m., at which conference the defense attorneys would be present.

Mr. Mulvehill was contacted at approximately 4:30 p.m. and advised of the conference set for Tuesday morning. Mr. Dymond and Mr. Richard had previously been aware of the conference.

At approximately 5:00 p.m. that afternoon, Mr. Mahl telephoned Mr. Mulvehill and was advised of his conversation with Mr. Volz and of the conference scheduled for Tuesday morning.

Although Mr. Dymond and Mr. Richard have no direct knowledge about the time that the conversation took place between Mulvehill and Volz, one thing they both observed was on April 20, 1981, on the day that the con-

versation occurred between Volz and Mulvehill, Volz appeared in the courtroom of Judge Boyle at the close of the day (or around 4:00 p.m.), and as Dymond and Richard were leaving the courtroom, they observed Volz in conference with his Assistants in the courtroom. Dymond and Richard were not notified at that time, even though they were in the vicinity of the courtroom, as to the things that had occurred earlier in the day.

On Monday, April 20, 1981, after the court had recessed for the day 4:00 p.m., Dymond and Richard returned to Richard's office to prepare for the next day. During the course of that evening, sometime after dark (approximately 7:00 p.m.), Dymond and Richard received a telephone call from Burl Mahl. Mahl informed them that he had discovered several tape recordings sometime over the weekend when he was going through materials he had stored in a mini-storage warehouse. On one of the recordings he discovered was a conversation he stated was between himself and Joseph Toranto which had taken place shortly before the passage of the first group of 24 loans. In the course of the telephone conversation, Mahl played the portion of the tape which contained the telephone conversation between himself and Toranto, including the preface to that conversation when he was speaking to a female in the office of Security Homestead in order to be connected with Joseph Toranto.

The taped conversation lasted no more than one and a half minutes and was substantially the same as the

testimony of Burl Mahl when questioned about it by Mr. Dymond and Mr. Richard.

After Mahl played that portion of the tape for Mr. Dymond and Mr. Richard, he indicated that he was going to destroy the tape because of other conversations involving people not involved in the pending indictment. It is the recollection of Mr. Dymond that Burl Mahl said words to the effect that one minute after he hangs up the telephone the tape would be destroyed. It is Mr. Richard's recollection that after Mahl indicated he would destroy the tape when he hung up the phone, he later said I am destroying the tape as I am talking to you.

Both Mr. Dymond and Mr. Richard tried to persuade Mahl not to destroy the tape, but he insisted that he had talked to his attorney and that his attorney told him that in view of the fact that he was under no court order in regard to the tape, it was his tape and he could do what he wanted with it. Mahl reiterated several times that he was going to follow the advice of his attorney.

On Tuesday morning, April 21, 1981 at approximately 8:00 a.m., Mr. Mulvehill was advised by Mr. Mahl that the tape recording in question and others had been destroyed by Mr. Mahl. Mr. Mahl's stated reason for this was his fear that many innocent people could be gravely injured were the entire contents of the tape recordings made public. At no time prior to this had Mr. Mahl informed Mr. Mulvehill nor Mr. Mulvehill informed any attorney for the

United States that Mr. Mahl might destroy the tape recording.

At the conference called by Judge Boyle, Mr. Mulvehill advised the Court and counsel of the tapes' destruction.

/S/ JOHN VOLZ
JOHN VOLZ
UNITED STATES ATTORNEY

/S/ MICHAEL SCHATZCW
MICHAEL SCHATZOW
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F. IRVIN DYMOND
Attorney for
EDMOND G. MIRANNE

/S/ DON M. RICHARD

DON M. RICHARD
Attorney for
EDMOND G. MIRANNE, JR.

APPENDIX "E"

STATEMENT OF UNIQUE FACTS

The appellants' co-defendant, Mahl, is a rare character. Mahl had a habit of taping telephone conversations to which he was a party. As a matter of fact, during the course of the trial, he testified that he taped conversations occurring on the telephone in his apartment by means of a voice-stimulated recorder which was hidden in the attic.

Mahl pled guilty to Count 1 of the indictment and became a Government witness. According to Mahl's testimony, he told Toranto that he was purchasing the properties; and he signed a blank application. Toranto actually wrote the words "renovate property" on the application.

Toranto testified as a Government witness and was one of the principal witnesses against the defendants. Toranto admitted that he wrote the alleged false statement on the application, which forms the basis of the charges against the appellants. Toranto testified at trial that he had no knowledge of the fact that the loans in question were being made for the purpose of purchasing the property.

Mahl had a tape recording of a telephone conversation resulting from a call placed to Security Homestead Association in which he spoke with Joseph Toranto. The tape recording had been made prior to the act of sale in January 1976. That tape recording contradicted the

testimony of Toranto. The essence of the conversation on the tape recording was that Mahl needed the loans to be rushed through because the purchase agreement on the properties was about to expire. After the trial and prior to the Court's decision on the motion for a judgment of acquittal notwithstanding the jury's verdict, counsel for defendants and Mahl, and Government attorneys filed with the Court a stipulation of facts which outlines the facts surrounding the discovery of and ultimate destruction of the tape recording in question. (See Appendix D.)

The events surrounding the tape began on April 20, 1981, (Monday of the second week of trial) at which time the record will reflect the Government had not yet rested its case. Mahl testified that he found the tape while rummaging through his mini-storage warehouse on the weekend preceding April 20, 1981. On Monday, April 20, he brought the tape to Jack Mulvehill, his attorney (the Federal Public Defender). Although Mahl refused to allow Mulvehill to retain or duplicate the tape, he did agree to permit the United States Attorney, John Volz, to listen to the tape. When the United States Attorney was offered the opportunity to listen to the tape, he refused on the basis: "Mr. Volz advised that it would not be necessary that he hear the tape since Mr. Mulvehill had related the contents to him ..." (See Appendix D.)

Volz left Mulvehill's office and went to the courtroom where the instant case was being tried. Volz met with his Assistants trying the case. When Messrs. Volz, Burns

and Schatzow told the Court of the tape and Mulvehill's declaration of its content, the Court ordered that Mulvehill be notified to attend a previously-scheduled conference in chambers on the following morning. The Court's instructions were communicated to Mulvehill at approximately 4:30 p.m. on April 20, 1981, after Court recessed for the day. (See Appendix D.) After the conversation between Mulvehill and the United States Attorney, and after Mulvehill had been informed of the conference, Mahl telephoned Mulvehill at approximately 5:00 p.m., and was advised of the fact that the United States Attorney refused to listen to the tape. This call from Mahl to Mulvehill occurred after Volz had met with his Assistants. At that point in time, the tape was still in existence because later that same evening, defense attorneys, Dymond and Richard, heard the tape during a telephone conversation with Mahl. The stipulation further provides that the taped conversation was "substantially the same as the testimony of Burl Mahl when questioned about it by Dymond and Richard" at the trial. Mahl had been recalled during the presentation of the defense case.

The following morning, a conference was held in chambers during which the contents of the tape recording were disclosed to the Court. The Court ruled that Mulvehill would not be allowed to testify about the contents of the tape when the Government urged that such testimony would be hearsay. The Court ruled that Mahl would be allowed to testify about the contents of the recording, and he subsequently did.

When Mahl was recalled to the stand by the defense to testify concerning the contents of the tape, he testified that the tape had been destroyed. He claimed that the tape had other conversations of other parties not involved in this litigation which could prove embarrassing, and he, therefore, decided that it was in his best interest to destroy the tape.